

# ANALYSIS OF ORIGINAL BILL

Franchise Tax Board

Author: Briggs Analyst: Marion Mann DeJong Bill Number: AB 1016

Related Bills: \_\_\_\_\_ Telephone: 845-6979 Introduced Date: 02/25/1999

Attorney: Doug Bramhall Sponsor: \_\_\_\_\_

**SUBJECT:** Confidentiality/Taxpayer Communications

## SUMMARY

This bill would entitle a taxpayer to the same protections of confidentiality, with respect to the tax advice given by any "state authorized tax practitioner," as the taxpayer would have if the advising individual were an attorney. The privilege would apply in any noncriminal tax proceeding before the Employment Development Department (EDD), Board of Equalization (BOE), Franchise Tax Board (FTB) or Department of Motor Vehicles (DMV) and would apply in any noncriminal tax proceeding in state court brought by or against this state.

## EFFECTIVE DATE

This bill would become effective on January 1, 2000.

## BACKGROUND

On July 22, 1998, President Clinton signed H.R. 2676, the Internal Revenue Service Restructuring and Reform Act of 1998 (IRS Reform Act). The IRS Reform Act provides for a massive reorganization of the way the IRS does business and creates a board of directors to help oversee the agency. The IRS Reform Act also provides various taxpayer rights and protections (e.g., burden of proof shift, innocent spouse relief, disabled taxpayer relief and extension of attorney-client privileges to any individual authorized to practice before the IRS) and instructs the IRS to promote and improve its electronic filing programs.

## SPECIFIC FINDINGS

**Federal law** (Section 330 of Title 31 of the United States Code) authorizes the Secretary of the Treasury to regulate the practice of representatives of persons before the Treasury. Thus, under federal law, individuals may be "authorized to practice" before the IRS. Generally, those authorized include attorneys, certified public accountants, enrolled agents and enrolled actuaries. The IRS has a program that oversees the activities of persons authorized to practice before it and can suspend or revoke that authority if the activities of the practitioner so warrant.

**State law** does not provide an authorization process similar to federal law. Generally, the taxpayer may authorize anyone to represent them (act as their agent) in noncriminal tax proceedings before the EDD, BOE, FTB or DMV.

Board Position:

_____ S	_____ NA	_____ NP
_____ SA	_____ O	_____ NAR
_____ N	_____ OUA	_____ X PENDING

Department Director

Date

Gerald Goldberg

4/6/1999

**The IRS Reform Act** extended the attorney-client privilege of confidentiality to tax advice, as defined, that is furnished to a client-taxpayer by any individual who is authorized to practice before the IRS and may be asserted in any noncriminal tax proceeding before the IRS as well as any federal court if the IRS is a party to the proceeding. The privilege applies only to the extent that communications would be privileged if they were between a taxpayer and an attorney. For example, information disclosed to an attorney for the purpose of preparing a tax return is not automatically privileged under present law, so that information would not be privileged under this provision. This confidentiality privilege also does not apply to tax shelters, as defined, or state tax advice.

**Under California** law, the attorney-client privilege is found in the Evidence Code (§950-§962).

**This bill** would generally conform to the federal law; entitling a taxpayer to the same protections of confidentiality, with respect to the tax advice given by any "state authorized tax practitioner," as the taxpayer would have if the advising individual were an attorney.

A "state authorized practitioner" would be any individual who is authorized under state law to practice before EDD, BOE, FTB or DMV.

The privilege would apply in any noncriminal tax proceeding before EDD, BOE, FTB or DMV and would apply in any noncriminal tax proceeding in state court brought by or against this state. The privilege would not apply to written communication regarding a corporation's involvement in tax shelters.

#### Policy Considerations

This bill would raise the following policy considerations:

- Current state law does not authorize individuals to practice before EDD, BOE, FTB or DMV. It is unclear who, if anyone, would qualify for the privileges intended by this bill. However, the author's staff has indicated that they are considering amending the bill to apply to individuals authorized to practice before the IRS. If amended as indicated by the author, the following two policy considerations apply.
  1. The IRS has a program that oversees the activities of persons authorized to practice before it and can suspend or revoke that authority if the activities of the practitioner so warrant. Since California has no such relationship with those authorized to practice before the IRS, it may not be appropriate to extend the privileges to such individuals. Moreover, conforming to these federal licensing standards would also conform to individual suspension and revocation decisions made by the IRS and would, unless any conformity language provided otherwise, preclude affected state agencies from suspending or revoking an individual's practice authority for purposes of the confidentiality privilege added by this bill.
  2. California law is broader than federal law in that it allows any individual to represent another individual in FTB related tax

matters. Limiting the extension of the privilege to IRS authorized representatives would mean that taxpayers using CPAs and enrolled agents would receive the benefit of the privilege, but taxpayers using other types of representatives would not be able to assert the privilege.

- In recent years, attorneys have become affiliated with accounting firms (as employees or principals) and the line between legal advice and that provided by accountants has blurred. This provision would afford CPAs the same privilege provided attorneys when discussing similar issues.

#### Implementation Considerations

If the bill is amended to grant an evidentiary privilege to certain specified representatives, it would introduce a new consideration into administrative and judicial proceedings for the resolution of tax disputes. While this bill would not significantly impact the programs administered by the department, it may increase costs of individual cases for taxpayers and the department due to disputes over whether the confidentiality privilege under this bill applies in a particular case.

#### FISCAL IMPACT

##### Departmental Costs

This provision would not impact the department's costs.

##### Tax Revenue Estimate

This would not impact state income tax revenues.

#### BOARD POSITION

Pending.